

3/29/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No.
PTH

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mark David Frankel

Serial Nos. 75/702,008; 75/702,010; and 75/702,011

Jeffrey L. Costellia of Nixon Peabody LLP for applicant.

Inga Ervin, Trademark Examining Attorney, Law Office 111
(Craig Taylor, Managing Attorney).

Before Hohein, Hairston and Bucher, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applications have been filed by Mark David Frankel to
register the marks set forth below:

GRANDMA SCHITTHED'S outhouse brown for beer and
ale;¹

¹ Serial No. 75/702,008, filed May 10, 1999, alleging a bona fide intention to use the mark in commerce. The word "BROWN" has been disclaimed apart from the mark as shown. The application includes a statement that "GRANDMA SCHITTHED" does not identify a living individual.

GRANDPA SCHITTHED'S INKY STINKY PALE ALE for beer and ale;² and

SCHITTHED'S for beer and ale; restaurant and bar services; mugs; and T-shirts and hats.³

The Trademark Examining Attorney has finally refused registration under Section 2(a) of the Trademark Act on the ground that each of the marks consists of or comprises immoral or scandalous matter. The Examining Attorney maintains that the term "SCHITTHED" is the phonetic equivalent of "shithead," a term which is offensive to a substantial composite of the general public.

Applicant, in each instance, has appealed. Briefs have been filed, but an oral hearing was not requested. Because the issue in each case is essentially the same, the appeals have been treated in a single opinion. We affirm the refusals to register.

Registration of a mark which consists of or comprises immoral or scandalous matter is prohibited under Section 2(a) of the Trademark Act. The Court of Appeals for the Federal Circuit, in *In re Mavety Group, Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994), reviewed the law regarding

² Serial No. 75/702,010, filed May 10, 1999, alleging a bona fide intention to use the mark in commerce. The words "PALE ALE" have been disclaimed apart from the mark as shown. The application includes a statement that "GRANDPA SCHITTHED" does not identify a living individual.

³ Serial No. 75/702,011, filed May 10, 1999, alleging a bona fide intention to use the mark in commerce.

scandalous or immoral matter. The court noted that the burden of proving that a mark is scandalous rests with the United States Patent and Trademark Office. The Examining Attorney must demonstrate that the mark is "'shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation.'" In re Mavety, 31 USPQ2d at 1925, citing In re Riverbank Canning Co., 95 F.2d 327, 37 USPQ 268 (CCPA 1938). The mark is to be considered in the context of the marketplace as applied to only the goods or services in the application for registration. Whether the mark consists of or comprises scandalous matter is to be determined from the standpoint of not necessarily a majority, but a substantial composite of the general public, and in the context of contemporary attitudes.

In support of her position that the term "SCHITTHED" is likely to be pronounced as "shit head," the Examining Attorney submitted a copy of page 1044 from Merriam Webster's Collegiate Dictionary (date unknown) which shows that there are several words where "sch" is pronounced as "sh."⁴ Further, in support of her position that the term

⁴ Examples are "schick test," "schiller," "schist," "schistose," "schistosome," and "schistosomiasis."

"shit head" is offensive, the Examining Attorney made of record evidence from the NEXIS database of stories published in newspapers and magazines. Specifically, the Examining Attorney has relied upon excerpts from 40 stories in which the term "shit head" or "shithead" appears. A review of these story excerpts reveals that many of them appear to be from foreign publications. In the absence of evidence establishing substantial circulation of the foreign publications in the United States, they are not competent to show the significance of the term "shit head" or "shithead" to the general American public. However, at least 24 of the excerpts are from United States publications.⁵ Representative samples of these excerpts are quoted below (with the term "shithead" or "shit head" emphasized):

Raucous sexual and scatological content is typically encountered in Quinn's work; his "Shit Paintings" and *Shit Head* of 1997, as well as *Incarnate* of 1996, a boiled sausage filled with the artist's blood, are primary examples. (Art in America, November 1998);

. . . picture may have bombed, but at least I won't go down in history as a spoiled, neurotic *shit-head* who got a tragic comeuppance!" (Film Comment, September 1, 1998);

⁵ We should point out that the Examining Attorney submitted the identical NEXIS evidence in each application.

It's easier now, when they're down. Wolfe did it when they were up; he realized that this worshipping of rich *shit-heads* had gone too far.

(Washington Monthly, March 1988);

Kushner can't write straight or gay relationships without being smug. Roy Cohn's death by AIDS, after a public career as [an] archconservative *shithead* and a simultaneous secret life with men, still holds interest . . .

(SF Weekly, January 24, 1991);

The effect is jarring: Jovial cartoons suddenly face the screen and call you a *shithead*.

(Slate Magazine, April 19, 2001);

. . . Schutze, in a New Times Story last fall, admitted, "The more I looked at this stuff, the more I thought there's no mystery here. These kids are little *shitheads*, and they have no excuses."

He also described the way Hollywood insisted on giving the characters excuses for their actions . . .

(New Times Broward-Palm Beach, July 19, 2001);

. . . reply to "Mr." Donaldson's letter (February 3), it is ignorant creeps like you who are the problem! Only a true *shithead* like you would think that [of] a desert filled with cactus, lizards and other of God's flora and fauna as a "shithole wasteland."

(Phoenix New Times, February 10, 2000); and

. . . make him artist of the year--quite a contrast to Dr. Dre, who edges Marilyn Manson and Celine Dion for *shithead* of the decade even if his grayboy Eminem has a lot better chance of turning Beastie than Limp Bizkit do . . .

(The Village Voice, February 22, 2000).

The NEXIS excerpts made of record by the Examining Attorney suggest that in the United States, the term "shithead" is used as a derogatory insult. In addition, we take judicial notice of the following definitions of "shithead" and "shit" from Random House Webster's Unabridged Dictionary (2d 1998):

shithead: n. Slang (vulgar) a stupid, inept, unlikable or contemptible person

shit: n. Vulgar. 6. Slang: a selfish, mean or otherwise contemptible person.

Applicant maintains that the first portion of the term SCHITTHED'S, i.e., "schitt," is identical to a German surname and commonly pronounced in both the United States and Germany as "sheet" or "skit". Thus, according to applicant, a number of consumers encountering the term SCHITTHED'S will pronounce it differently than "shitheads." However, we note that applicant has failed to offer any evidence to support its contention with respect to "schitt" being a German surname and the purported common pronunciation thereof. Further, applicant argues that among the words beginning with "sch" on the dictionary page relied on by the Examining Attorney, there are more words that are pronounced with the "ski" sound than with the "sh" sound. As noted by the Examining Attorney, however, there is no correct pronunciation of a trademark and it is just

as likely that the term "SCHITTHED" would be pronounced "shithead."

Citing *In re Mavety*, applicant argues that the term "SCHITTHED" must be considered in the context of the relevant marketplace, and that applicant's beer and ale are products that are marketed to adults. We note, however, that unlike the situation in *In re Mavety*, which involved adult-oriented magazines that are purchased by a narrow segment of the United States adult population, beer and ale are marketed to, and purchased by, a cross-section of the United States adult population. In addition, beer and ale are advertised on radio and network television, and are displayed in grocery stores, convenience stores, and the like in plain view of the general consuming public. This is in contrast to the adult-oriented magazines in *In re Mavety* that are generally sold in adult-oriented bookstores, or when sold in general news or magazine stands, are kept behind the counter or displayed in a special section. Moreover, in the case of the SCHITTHED'S mark, applicant intends to use this mark in connection with not only beer and ale, but restaurant services, mugs, t-shirts, and hats. Clearly, the market for these goods and services is not limited to adults.

We note applicant's reliance on *In re Hershey*, 6 USPQ2d 1470 (TTAB 1988), involving the mark BIG PECKER BRAND for T-shirts. In holding that the mark BIG PECKER BRAND does not offend morality or raise scandal, the Board found that the primary meanings of the word "pecker" to the general public are innocuous, rather than vulgar. In this case, applicant has presented no evidence that "SCHITTHED" has any particular meaning, and the NEXIS excerpts and dictionary entries support the Examining Attorney's position that "shithead" is a derogatory insult. Even if, as applicant argues, the purchasing public would be likely to view the phrases GRANDMA SCHITTHED'S and GRANDPA SCHITTHED'S as references to a fictional characters, the phrases would nonetheless be offensive.

Applicant argues that the involved marks are not scandalous to a substantial composite of the general public. Applicant maintains that the fact that the term "shit head" or "shithead" appears in the magazine and newspaper excerpts submitted by the Examining Attorney is evidence that the term is not scandalous. A close examination of the story excerpts reveals that most, if not all, of the stories are in the nature of social commentary or art or film reviews. In other words, these stories do not evidence use of the term "shithead" or "shit head" in

ordinary discourse. Also, most of the publications in which the stories appear are somewhat specialized in nature; they are not general interest publications read by a cross-section of the American public. In short, we are not convinced that these stories are of a nature that they have been exposed to a large segment of the American public. Thus, the fact that the term "shithead" or "shit head" appears therein does not persuade us that the term is not scandalous to a substantial composite of the American public.

Finally, applicant argues that its involved marks are no more scandalous or immoral than other third-party marks which the Office has allowed to register. However, as has often been stated, each case must be decided on its own set of facts. We are not privy to the file records of those third-party registrations.

In sum, we believe the evidence of record is sufficient to establish prima facie that the term "shithead" or "shit head" is offensive to the conscience of a substantial composite of the general public, notwithstanding the fact that contemporary attitudes toward coarse language are more liberal than they were just a generation ago. See *In re Tinseltown, Inc.*, 212 USPQ 863 (TTAB 1981) [The mark "BULLSHIT" for attaché cases,

Ser Nos. 75/702,008; 75/702,010; and 75/702,011

handbags, purses, belts, and wallets is scandalous].

Because the term "SCHITTHED" in applicant's marks has not been shown to have any particular meaning, and may well be pronounced as "shithead," we find that applicant's marks consist of or comprise scandalous matter.

Decision: The refusals to register under Section 2(a) of the Trademark Act are affirmed.